Supreme Court, U.S.
FILED

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1999

KELVIN WEST,
Petitioner,

v.

THE STATE OF TEXAS,

Respondent,

Petition For Writ of Certiorari To the Texas Court of Appeals for the Fourteenth Court of Appeals District

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PETITION FOR WRIT OF CERTIORARI

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19pp

QUESTION PRESENTED FOR REVIEW

The Defendant was stopped in his vehicle by police for the offense of speeding. The police officer initiating the stop testified that he smelled the odor of marijuana coming from the Defendant's car. Based upon the smell alone, the officer searched the interior of Defendant's vehicle and found a controlled substance inside the Defendant's small black bag. Defendant moved to suppress the evidence on Fourth Amendment grounds. The police officer testified that the marijuana odor was not coming from the black bag, but from the interior of the Defendant's vehicle. The trial court denied the Appellant's Motion to Suppress Evidence and the Court of Appeals affirmed the trial court. The court of appeals held that the odor of marijuana alone constitutes sufficient probable cause to search the interior of a vehicle, including any containers within. Does this deny the Defendant the right to be free from unreasonable search and seizure under the Fourth Amendment?

LIST OF ALL PARTIES

R. Scott Shearer - Attorney for Appellant.

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Kelvin West - Appellant.

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Honorable Mary Lou Keel -Presiding Judge of the Trial Court.

232nd District Court
1201 Franklin
Houston, TX 77002

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CITATION TO OPINIONS BELOW

The opinion of the Fourteenth Court of Appeals is not reported. It is included in the appendix to this writ.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on July 8, 1999. The Defendant's Petition for Discretionary Review was denied by the Texas Court of Criminal Appeals on February 23, 2000. This Court has jurisdiction pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fourth Amendment to the United States Constitution reads in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The Defendant was charged with possession of a controlled substance. The Defendant entered a conditional plea of guilty and moved to suppress the evidence seized from his vehicle on Fourth Amendment grounds. When the trial court overruled his motion, Defendant was sentenced to five years confinement. The Defendant then appealed to the court of appeals, where he argued that the search of his vehicle and his personal luggage was an illegal search under the Fourth Amendment to the United States Constitution. *See West v. State*, (Tex. App. - Houston [14th Dist.] 1999, pet. ref'd)(unpublished). After the court of appeals affirmed his convictions, the Defendant filed a Petition for Discretionary Review with the Court of Criminal Appeals, where he again raised the Fourth Amendment issue. Defendant's petition was denied on February 23, 2000. This Petition for Writ of Certiorari is timely filed within 90 days of the entry of the order denying review. *See* SUP. CT. R. 13.1.

SUMMARY OF THE ARGUMENT

Police may not search a citizen's vehicle and the contents within simply because they smell the odor of marijuana. Odor alone is insufficient to establish probable cause for a full blown search of a vehicle stopped for a traffic offense.

ARGUMENT

The Defendant had a possessory interest in the car, the bag, and the items they each contained. The protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy. *Rakas v. Illinois,* 439 U.S. 128, 99 S.Ct. 421 (1978). Therefore, the defendant has standing to complain of the search of the car, the black bag, and its contents.

Except for a few specifically established exceptions, warrantless searches are per se unreasonable. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514 (1967). A warrantless search of an automobile is permissible where police have probable cause to believe the vehicle contains contraband. *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280 (1925). The automobile exception is applicable only if "the overriding standard of probable cause is met." *California v. Carney*, 471 U.S. 386, 392, 105 S.Ct. 2066, 2069 (1985).

An individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. *United States v. Johns*, 469 U.S. 478, 105 S.Ct. 881 (1985).

The question presented by this case is whether the odor of marijuana alone triggers probable cause and allows the full search of an automobile and all its contents. Odor of marijuana can be probative in establishing probable cause. *Johnson v. United States*, 333 U.S. 10, 13, 68 S.Ct. 367 (1948). However, odor alone is not sufficient to satisfy the requirements of the automobile exception. *Cf. Taylor v. United States*, 286 U.S. 1, 52 S.Ct. 466 (1932)(odors alone do not authorize a search without a warrant).

This Court has struggled with the issue of whether, and to what extent, odor alone provides sufficient probable cause for a warrantless search. The issue remains unsettled. *Compare Taylor v. United States*, 286 U.S. 1, 52 S.Ct. 466 (1932); *Johnson v. United States*, 333 U.S. 10, 13, 68 S.Ct. 367 (1948); *United States v. Johns*, 469 U.S. 478, 489, 105 S.C.t 881, 888 (1985)(BRENNAN, J. dissenting).

Many lower circuits hold that odor alone is sufficient. *See, e.g., United States v. Staula*, 80 F.3d 596, 602 (1st Cir. 1996) *cert. denied*, --- U.S. --- , 117 S.Ct. 156 (1996); *United States v.Haley*, 669 F.2d 201, 203 (4th Cir. 1982) *cert. denied*, 457 U.S. 1117, 102 S.C.t 2928 (1982); *United States v. Henke*, 775 F.2d 641, 645 (5th Cir.1985) ("Once the officer smelled the marijuana, he had probable cause to search the vehicle."); *United States v. Neumann*, 183 F.3d 753, 756 (8th Cir. 1999) *cert. denied* --- U.S. ---, 120 S.C.t 438 (1999); *United States v. Morin*, 949 F.2d 297, 300 (10th Cir. 1991);

A split of authority occurs, however, when the issue is framed as one of degree. Many courts hold that odor alone does not satisfy probable cause to conduct a warrantless search of every compartment and container in the vehicle. *See United States v. Parker*, 72 F.23 1444, 1450 (10th Cir. 1995)(marijuana smell in passenger compartment did not establish probable cause to search trunk of car.); *United States v. Nielson*, 9 F.3d 1487, 1491 (10th Cir. 1993); *United States v. Johns*, 707 F.2d 1093, 1095-1096 (9th Cir. 1993) overruled on other grounds, *United States v. Johns*, 469 U.S. 478, 489, 105 S.C.t 881, 888 (1985)(plain odor does not obviate need for a search warrant.).

Defendant submits that odor alone is insufficient to justify the warrantless seatch of an automobile. As further support, however, Defendant notes that the scope of a warrantless search of an automobile, "is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *United States v. Ross*, 456 U.S. 798, 824, 102 S.Ct. 2157 (1982). In the present case, the searching officer specifically testified that the odor of marijuana was not coming from the black bag. (Record at 30).

Thus, the general marijuana odor did not provide the officer with probable cause to search the Defendant's bag.

The are common sense reasons that support the requirement that something more than a general odor of marijuana is required before conducting a warrantless search of a closed container in an automobile. Marijuana smoke, like cigarette smoke, does not distinguish between smokers and non-smokers. Like cigarette smoke, marijuana smoke clings to the hair, clothes, and bodies of anyone within range of the smoke. The stench of smoke can last for days. This is a well known fact. The collateral effects of cigarette smoke are frequently the subject of litigation. This Court has, on occasion, visited the issue of city and state and federal ordinances designed to protect non-smokers from nuisance of second hand cigarette smoke.

The mere presence of the odor of cigarette smoke is not determinative of whether a person is a smoker or non-smoker of cigarettes. Likewise, mere presence of the odor of marijuana smoke is not determinative of whether a person is a marijuana smoker. Unfortunately, marijuana smoke is frequently present at concerts, festivals, and other indoor and outdoor events. Can it be said that everyone present at these gatherings waives their right to be free from unreasonable search and seizure merely because the odor of marijuana wafts downwind and clings to their person? Unlike the presence of the actual drug, law abiding citizens have no choice when it comes to avoiding contamination by the drug's smoke. Smoke is a free flowing substance, subject only to the whim of the prevailing air currents. To allow the protections of the Fourth Amendment to be overcome by the mere odor of marijuana smoke renders the Fourth Amendment sterile.

CONCLUSION

The search of the Defendant's vehicle and its contents based upon the odor of marijuana smoke alone violates the Fourth Amendment to the United States Constitution.

Respectfully submitted,

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In The
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THE STATE OF TEXAS,

Respondent,

Petition For Writ of Certiorari To the Texas Court of Appeals for the Fourteenth Court of Appeals District

APPENDIX

OPINION

Affirmed and Opinion filed July 8, 1999.

In The

Fourteenth Court of Appeals

NO. 14-97-00359-CR

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 746313

OPINION

Appellant, Kelvin West, was charged with felony possession of a controlled substance along with one enhancement paragraph for a prior similar offense. After the trial court denied his motion to suppress, appellant pleaded guilty to the offense and pleaded true to the enhancement paragraph. Punishment was assessed at five years confinement and this appeal followed.

On the night of March 23, 1996, two Houston Police officers observed appellant's vehicle exceeding the speed limit by eleven miles an hour. The officers proceeded to pull the vehicle over and perform a routine traffic stop. As the officer approached the vehicle, he detected the odor of marijuana and observed that the appellant was glassy-eyed. The officer asked appellant for his driver's license and registration.

Appellant turned his back away from the officer and reached into a small black bag sitting on the passenger seat of the car. When it was apparent that the appellant could not find his proof of insurance, the officer suggested that he look in his glove compartment, which was where it was located. Concerned about what was in the black bag, the officer asked appellant if he had any weapons and the appellant responded that he did not. However, because the appellant seemed to be nervous, the officer asked the appellant to get out of the car. The officer then placed appellant in the back seat of the patrol car, and proceeded to search the car. In the black bag the officer found a green leafy substance, which turned out to be marijuana.

Appellant filed a Motion to Suppress, which alleged that the seizure of the marijuana was a result of an illegal detention and search. The trial court denied the Motion to Suppress and the appellant now appeals. Appellant presents two issues for review in which he asserts that (1) the officer's placement of the appellant in the patrol car was unlawful and unnecessary detention, and (2) the warrantless search that followed the detention was not based on probable cause or any other exception to the warrant requirement. The State contends that the odor of marijuana perceived by the officer, standing alone, supplied the requisite probable cause to search the vehicle. We agree and affirm the judgment.

We review determinations of probable cause and reasonable suspicion de novo. *See Guzman v. State*, 955 S.W.2d 85,87 (Tex. Crim. App. 1997) (citing *Ornealas v. United States*, 517 U.S. 690, 116 S.Ct. 1657 (1996). However, we defer to the trial court for findings that are based on evaluations of the credibility and demeanor of witnesses. *See Id.* at 89. At the hearing on the Motion to Suppress, the officer testified that he perceived the odor of marijuana coming from appellant's car. It is apparent that the trial court believed the officer's testimony. Texas law is clear that the odor of marijuana alone is sufficient [2] to constitute a

probable cause to search a defendant's person, vehicle, or objects within the vehicle. *See Isam v. State*, 582 S.W.2d 441, 444 (Tex. Crim. App. [Panel Op.] 1979); *Moulden v. State*, 576 S.W.2d 817, 819-20 (Tex. Crim. App. [Panel Op.] 1978). Therefore, if the officer's initial traffic stop of the appellant was reasonably justified, which is not contested, the search of the automobile was also proper based on the officer's perception of the odor of marijuana. The trial court did not err in denying the appellant's motion to suppress. Appellant's issues for review are overruled.

The judgment is affirmed

/s/ Norman Lee
Justice

Judgment rendered and opinion delivered July 8, 1999.

Panel consists of Justice Yates, Fowler, and Lee.[1]

Do not publish - TEX. R. APP. P. 47.3(b).

[1] Senior Justice Norman Lee sitting by assignment

[3]

DENIAL OF DISCRETIONARY REVIEW

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS 78711

February 23, 2000
COA#: 14-97-00359-CR
RE: Case No. 1554-99
STYLE: WEST, KELVIN

On this day, the Appellant's Petition For Discretionary Review has been REFUSED.

AUSTIN TX FEB 23'00 =020= PITNEY BOWES METER 7207129 U.S. POSTAGE

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